

Mr Darrell Channing  
Director  
Adjudication Branch  
Australian Competition & Consumer  
Commission  
23 Marcus Clarke Street  
Canberra ACT 2601

22 September 2017

Attn: Mr Simon Bell

**By email**

Dear Mr Channing

**RE: INDEPENDENT CINEMAS AUSTRALIA INC. - APPLICATION FOR  
AUTHORISATION A91587**

**1. Introduction**

As the Commission is aware, we act for Universal Pictures International Australasia Pty Ltd (**UPI**) in this matter. Our client has reviewed the most recent submissions by Independent Cinemas Australia Inc (**ICA**) dated 30 and 31 August 2017 in relation to ICA's application for authorisation dated 8 June 2017 (**Application**). UPI wishes to make a short submission on several matters raised by those submissions.

**2. Rationale for the Application**

It remains the case that ICA has not provided any persuasive rationale for the Application. In ICA's 30 August 2017 submission, it is stated that:

*"Interested parties have expressed the view that there is no need for the authorisation to be granted and that the film industry in Australia is not suffering from any form of market failure. ICA submits that our application for authorisation does not arise out of a major market failure but the likelihood based on current experience that digital disruption in the industry is exacerbating an existing imbalance in market power that disadvantages*

*independent exhibitors and can be appropriately redressed by authorisation of the activities requested.*

*ICA has specifically sought authorisation in response to a recent significant change in custom and practice and anticipated likely changes such as to the exclusive theatrical release window. We are seeking separate authorisation for information sharing activity and for collective negotiation activity due to our observation that independent exhibitors are not being included in negotiations, or being provided transparent information concerning matters affecting every member exhibitor such as changes to the exclusive theatrical release window on film titles and digital delivery and marketing practices."*

No evidence has been provided by ICA to support these statements. UPI is not aware as to how "digital disruption" is "exacerbating an existing imbalance in market power". If the intention of ICA is to refer to an increased consumer preference for consuming content via online streaming, in fact this is an issue that distributors themselves, as well as many other participants in the content creation and delivery sectors, are equally impacted by, but it is not something which we are aware is creating any imbalances of bargaining power at the current time. Further, there is no credible evidence that market changes will lead to the type of imbalance that appears to be of concern to the ICA in the foreseeable future.

### **3. Code of Conduct**

ICA in its submission of 30 August 2017 acknowledges that the Code of Conduct for Film Distribution and Exhibition 2013 (**Code**) "is an important and useful tool", but then goes on to state that "the Code does not adequately address the issues that ICA members face in their dealings with distributors". In particular:

"The intention of the authorisation is to address areas which the Code currently does not, and to operate alongside the Code to provide independent exhibitors with necessary information and support in negotiations with distributors."

It is unclear to UPI what the procedural and practical deficiencies in the operation of the Code are that need to be addressed outside of or "alongside" the Code. If the primary issue of concern to the ICA is the operation of the Code, it should seek changes to the Code by raising these matters before the Code Committee in an appropriate and transparent manner. There is an existing framework within the Code for this to occur.

Strengthening the Code and retaining this as a primary mechanism for resolution of issues is also preferable given that the Code requires distributors to look at the individual circumstances of each exhibitor. As outlined below, given the diversity of exhibitors and the number of distributors, this is a significant benefit of the Code. The proposed collective bargaining for which authorisation is sought does not allow for recognition of this diversity and dynamic.

ICA raised in its submission a concern as to "late information". This is, from the perspective of UPI, a new issue which has not been raised with it. This supports UPI's view that the appropriate approach is for the ICA to raise its concerns, and for the parties to seek to resolve those concerns, within the framework of the Code rather than proceeding to an authorisation at this time.

We also note from a legal perspective the characterisation of the authorisation somehow sitting "alongside" the Code creates some legal uncertainties as to the extent of the proposed authorisation and its interaction with the Code.

#### **4. Members that will benefit**

Perhaps reflecting that there is no clear rationale for the Application, the ICA has been unable to say which of its members will participate in the collective bargaining that is proposed. In ICA's submission dated 30 August 2017, ICA states that the members who will participate will become clear only after any authorisation is granted.

In light of this, it is difficult to assess the competitive impact of the proposed conduct, unless you assume for the purposes of an initial competition assessment that all of the ICA members will participate. Collective bargaining by such a large and diverse membership base of exhibitors raises issues from a competition perspective. Collective bargaining typically results in all participants receiving the same outcomes – however, with such diversity in exhibitors (as well as distributors), the services delivered by distributors vary greatly. A "one size fits all" outcome is not appropriate.

In assessing whether to grant the Application, where there is such a diversity of market participants it is also necessary to consider the interests of consumers. The outcomes of a collective bargaining arrangement may reduce the incentive of exhibitors to compete against each other and stifle innovation. In some areas (particularly in regional areas) ICA members may be the only exhibitors. In those cases, the Commission would also need to carefully consider whether an increase in bargaining power of such exhibitors may result in poorer outcomes for consumers.

## 5. Information sharing and practicalities

The ICA proposes that the Application will permit members to share information as to "proposed terms and to better understand and assess the fairness of terms available to their business". Even if exhibitors have the ability to share information, it does not mean this will establish an appropriate comparison base to assess fairness – there are many reasons why contractual terms vary across exhibitors and distributors. As mentioned previously, at the current time, contractual terms reflect the diverse nature of distributors and exhibitors and the different services that are actually provided.

As noted by industry participants, the contracts negotiated with exhibitors are subject to confidentiality obligations. The ICA proposal is therefore also potentially problematic as it involves the exchange of confidential information by a possibly large and diverse group in relation to distributors who may themselves have opted out of being involved in any collective negotiations. It is not clear from the various ICA submissions whether, if an exhibitor has opted in, it has the ability to exchange confidential information with other exhibitors and whether that information would flow to other competing distributors. We would assume not and that any exchange between exhibitors would be subject to confidentiality obligations. Inevitably however the broader is the ability to exchange confidential information, the more difficult it becomes to protect that information from disclosure, including to competing distributors.

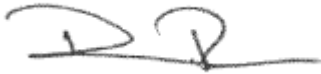
The ICA recent submissions do not address the concern raised as to exchanging information in relation to distributors who do not wish to be involved in collective bargaining with particular exhibitors, in different regions or at all.[ It is not clear that there are safeguards to allow these types of information exchanges to occur in relation to parties which consent to the arrangements and there is the potential for significant detriments to arise that cannot be protected by authorisation conditions.]

## 6. Booking windows

A final, issue relates to booking windows. "Booking windows" are negotiated with individual exhibitors on a film by film basis, having regard to a myriad of issues concerning release dates and jockeying between distributors. UPI has significant concerns both as to the utility and inefficiency that the additional "layer of bureaucracy" proposed by ICA could create. It is unclear from the ICA's most recent submissions how the booking of films will occur in practice. At times ICA suggests this will not be something undertaken by ICA and at other times it suggests that it may seek to negotiate this on behalf of members.

It is not possible for booking windows to be negotiated only between ICA and a distributor. As a practical matter, it will always be necessary for the distributor and the exhibitor to negotiate these issues. The Application should be amended to clarify that collective bargaining does not extend to booking window negotiation. Otherwise, it is arguable that the cost savings that are claimed as public benefits may actually be cost inefficiencies and detriments.

Yours faithfully

A handwritten signature in black ink, appearing to read 'DP', with a horizontal line extending to the right from the end of the signature.

Dave Poddar  
Partner